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No. 79-68

# In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT L. PRESTON, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## INDEX


Page

Opinions below ..... 1

Jurisdiction ..... 1

Questions presented ..... 1

Statute involved ..... 2

Statement ..... 3

Argument ..... 6

Conclusion ..... 12


### CITATIONS

Cases:


*Dalehite* v. *United States*, 346 U.S. 15 ..... 12

*De Bardeleben Marine Corp.* v. *United States*, 451 F. 2d 140 ..... 9

*Dickens* v. *United States*, 545 F. 2d 886 ..... 9

*Fitch* v. *United States*, 513 F. 2d 1013 ..... 9

*Harmsen* v. *Smith*, 586 F. 2d 156 ..... 12

*Hartz* v. *United States*, 387 F. 2d 870 ..... 9

*Indian Towing Co.* v. *United States*, 350 U.S. 61 ..... 10

*Ingham* v. *Eastern Air Lines, Inc.*, 373 F. 2d 227, cert. denied, 389 U.S. 931 ..... 10

*Moon* v. *Takisaki*, 501 F. 2d 389 ..... 9

*Ramirez* v. *United States*, 567 F. 2d 854 ..... 10

*Redmond* v. *United States*, 518 F. 2d 811 ..... 9

*Seanwell Laboratories, Inc.* v. *Thomas*, 521 F. 2d 941, cert. denied, 425 U.S. 910 ..... 9

Page

Cases (Continued):

*Smith* v. *United States*, 333 F. 2d 70 ..... 9

*Summers* v. *United States*, 510 F. 2d 123 ..... 9

*Thompson* v. *United States*, 408 F. 2d 1075 ..... 9

*United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379, cert. dismissed, 379 U.S. 951 ..... 10

*United States* v. *Longo*, 464 F. 2d 913 ..... 9

*United States* v. *Neustadt*, 366 U.S. 696 ..... 8, 9, 11

*Wenninger* v. *United States*, 234 F. Supp. 499, aff'd, 352 F. 2d 523 ..... 10

*Wiseman* v. *United States*, 327 F. 2d 701 ..... 9, 10

*Yates* v. *United States*, 497 F. 2d 878 ..... 9

*Zabala Clemente* v. *United States*, 567 F. 2d 1140, cert. denied, 435 U.S. 1006 ..... 11

Statutes and regulations:

Federal Tort Claims Act:

28 U.S.C. 1346(b) ..... 2, 11

28 U.S.C. 2680(a) ..... 6, 12

28 U.S.C. 2680(h) ..... 2, 6, 7, 8

15 U.S.C. 714, *et seq.* ..... 3

7 C.F.R. Part 1421 ..... 3

7 C.F.R. 1421.5557 ..... 12

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 596 F. 2d 232. The opinion and order of the district court (Pet. App. 16a-18a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on April 16, 1979. The petition for a writ of certiorari was filed on July 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether a claim based upon the failure of the Commodity Credit Corporation (CCC) to inform private citizens of the results of its audits of warehouses with

which CCC has entered into a Uniform Grain Storage Agreement is barred by the "misrepresentation" exception of the Federal Tort Claims Act, 28 U.S.C. 2680(h).

2. Whether the Commodity Credit Corporation (CCC) has an actionable duty to inform private citizens of the results of its audits of warehouses with which CCC has entered into a Uniform Grain Storage Agreement.

## STATUTE INVOLVED

The Federal Tort Claims Act provides in pertinent part:

> (b) * * * [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for * * * loss of property * * * caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(28 U.S.C. 1346(b)).

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights * * *.

(28 U.S.C. 2680(h)).



## STATEMENT

In 1957 Benjamin T. Green secured a Wisconsin license for Grain Finance Company, Inc. (Grain Finance), to operate a public warehouse in Evansville, Wisconsin. In December 1965, he secured a similar license for Farmers Grain Exchange, Inc. (FGX), to operate a public warehouse at the same location as the Grain Finance warehouse. Green thereafter stored grain for farmers in the Evansville area at that warehouse and issued warehouse receipts in the names of Grain Finance and FGX, commingling the grain stored by Grain Finance with the grain stored by FGX (Pet. App. 2a).

Beginning in late 1959, the Commodity Credit Corporation (CCC) approved the Grain Finance warehouse facility as a depository for CCC-owned grain. In July 1969, CCC also approved that warehouse as a depository for grain acquired by CCC as a result of its loans to farmers. Simultaneously with the latter approval, Green and CCC entered into a Uniform Grain Storage Agreement. By virtue of that agreement, farmers with grain on deposit in the warehouse could obtain loans from CCC secured by the grain they had deposited there.[1] CCC regularly causes inspections and audits to be made of CCC-approved warehouses to assure that they are safe

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[1] CCC, as part of a program to support the price of agricultural commodities and to control harmful fluctuations in the supply of those commodities, is authorized to extend low-interest non-recourse loans to farmers, using grain deposited by them in CCC-approved warehouses as collateral. See generally 15 U.S.C. 714 *et seq.*; 7 C.F.R. Part 1421. If the farmer repays the loan and interest he may reclaim his grain. If he does not repay the debt, CCC takes title to the grain and the farmer's obligation is completely discharged. Thus, a farmer in effect has the option of selling the grain to CCC for the amount of the loan or, if the market is higher later, of repaying the loan, reclaiming the grain and selling it at the market price.

places for the storage of grain either owned by CCC or used as collateral for CCC loans (Pet. App. 2a-3a).

In cooperation with CCC, the Agricultural Marketing Service (AMS) conducted audits of Grain Finance in September 1969, May 1970, December 1970, May 1971, October 1971, May 1972, November 1972, April 1973, August 1973 and August 1974 (Pet. App. 3a).

Petitioners allege (Pet. 7-8) that, after July 1, 1969, Green began speculating with the grain stored in the warehouse. Consequently, a disparity occurred between the number of bushels that Grain Finance actually had on hand and the number of bushels with respect to which it was obligated. Green allegedly also began making book transfers without consideration from FGX to Grain Finance. Petitioners further allege (Pet. 10) that the November 1972 AMS audit of Grain Finance disclosed a shortage of 12,983 bushels. In November 1972, at Green's request, CCC withdrew its approval of his warehouse so that after that date CCC loans were no longer available for grain stored there (Pet. App. 4a). However, AMS continued to audit the facility, which still contained grain that was owned by CCC or served as collateral for CCC loans (*ibid.*).

Petitioners are farmers who did business with Grain Finance and FGX and borrowed money from CCC secured by their grain on deposit at Green's warehouse. Petitioners also deposited grain with Grain Finance and FGX under other arrangements, including simple bailments and "price later" contracts,[2] which did not involve CCC loans (Pet. App. 4a).

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[2]Under "price later" contracts some of the grain deposited with Grain Finance and FGX was purchased by those companies subject to agreements to pay the market price for it at a future date (Pet. App. 5a n.3).



Petitioners assert that they were "lured" into doing business with Grain Finance because of the CCC audit process which, in their view, would insure that the warehouse was "a safe place in which to store grain" (Pet. 6). Petitioners were not notified of the results of the November 1972 audit of Grain Finance (Pet. 10-11). They continued to do business with Grain Finance until November 14, 1974, when a state court receiver was appointed for both Grain Finance and FGX (Pet. App. 4a).[3] In June and August 1976, petitioners filed administrative claims for money damages with the Department of Agriculture, which denied them in December 1976.

The complaint in this action then followed. Petitioners sued the United States under the Federal Tort Claims Act, claiming that they had lost $1,910,057.42 in their dealings with Grain Finance and FGX by reason of the negligent and wrongful actions of the Department of Agriculture, CCC, and AMS (Pet. App. 1a-2a). Specifically, petitioners alleged that CCC's failure to discover and to inform them of the poor financial conditions of Grain Finance and FGX and the grain shortages prior to November 1972 was negligent. Moreover, petitioners alleged that they were injured by CCC's intentionally wrongful conduct in not notifying them of the results of the November 1972 audit. In addition, petitioners claimed that CCC wrongfully converted certain of petitioners' grain (Pet. App. 5a-6a).

The government filed a motion to dismiss, asserting, *inter alia*, that (1) there was no actionable duty on the part of the United States to the petitioners, (2) the discretionary function exception of the Federal Tort

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[3]FGX filed a bankruptcy petition in September 1974, and Grain Finance did so in February 1975 (Pet. App. 5a).

Claims Act (28 U.S.C. 2680(a)) was applicable, and (3) the misrepresentation or deceit exception of the Tort Claims Act (28 U.S.C. 2680(h)) also barred recovery (Pet. App. 6a).

The district court granted the government's motion, concluding that the complaint was essentially an action for misrepresentation or deception and therefore was barred by Section 2680(h) (Pet. App. 18a). The court also held that Wisconsin's premises liability law regarding duties to invitees did not establish any duty on the part of the United States in this case because the state law does not apply to "economic losses sustained by persons who deposit their tangible goods, such as grain, in a physical facility, such as a warehouse" (Pet. App. 18a). The court made no ruling with respect to petitioners' claim of conversion of their grain.

The court of appeals affirmed the district court's holding as to the applicability of the misrepresentation exception (Pet. App. 1a-13a).[4] The court of appeals agreed that CCC's alleged failure to inform was essentially a claim of misrepresentation, not negligence, and thus was not within the Tort Claims Act (Pet. App. 8a-13a). The court, however, did not address the government's argument that it owed no duty to petitioners to inform them of the results of AMS audits (*id.* at 10a n.9).

## ARGUMENT

The court of appeals correctly concluded that petitioners' complaint does not state a cause of action under the Federal Tort Claims Act. The government did not breach any duty that it owed to petitioners. Moreover, to the extent that petitioners allege that a duty was owed, petitioners' action is one for misrepresentation, which is barred by the misrepresentation exception to the Tort Claims Act contained in 28 U.S.C. 2680(h).

[4]The court of appeals reversed and remanded (Pet. App. 14a-15a) with regard to petitioners' claim of conversion of their grain.



1. Petitioners contend (Pet. 12-18) that their action for both a negligent and intentional failure to warn is not barred by 28 U.S.C. 2680(h). Yet no tort claim other than misrepresentation is raised by petitioners' complaint. Petitioners contend (Pet. 5-6) that they were "lured" to Green's warehouse to store their grain because it was approved by CCC. They further contend (Pet. 6) that CCC's approval was an "invitation" to the farmers that carried with it a duty to audit the warehouse and warn the farmers if it was not a safe place to store grain. As the court of appeals recognized (Pet. App. 10a), petitioners' claim is essentially that CCC approval of a warehouse is a representation to farmers that the warehouse is safe, which gives rise to a duty to inform the farmers when it is known that the representation is not true. The claim that CCC is liable for a failure to warn that Green's warehouse was not safe is no more than a claim that CCC misrepresented the warehouse as safe.

Petitioners seek to avoid the misrepresentation exception by characterizing their action as one for negligence (Pet. 9). This characterization does not comport with the facts. Petitioners seek damages for losses caused by the government's failure to notify them of the results of the November 1972 audit. This contention involves no allegation of negligence. Petitioners allege that the November 1972 audit *did* discover grain shortages (Pet. 10); thus, it is not alleged that the audit was negligently performed. Petitioners also characterize the government's failure to notify them of the audit results as intentional (Pet. 10, 18). Clearly, petitioners are claiming damages caused by an intentional tort, yet petitioners do not

suggest what this alleged tort might be if it is not, as the district court and court of appeals correctly found it to be, an implied misrepresentation that the warehouse was safe.

Petitioners also claim that the government was negligent in failing to warn them of the condition of the warehouse prior to the November 1972 audit. Petitioners themselves recognize (Pet. 18) that it is illogical to permit a claim for the alleged negligent failure to warn prior to the November 1972 audit and not to permit a claim for the alleged intentional failure to warn after the audit. The court of appeals correctly held that petitioners cannot assert either claim. The contention that the United States negligently failed to warn petitioners simply alleges a negligent misrepresentation which is excluded from the Tort Claims Act by 28 U.S.C. 2680(h). *United States* v. *Neustadt*, 366 U.S. 696 (1961). The claim alleged in this case is similar to that denied in *Neustadt*. There, plaintiffs claimed that they overpaid in purchasing a house because they relied on a negligently performed FHA appraisal. Here, petitioners claim they stored their grain in a warehouse, assuming it to be safe in reliance on the fact that CCC approved the warehouse, where CCC negligently failed to warn petitioners that the warehouse was not safe. As the Court said in *Neustadt* (366 U.S. at 706):

> To say * * * that a claim arises out of "negligence," rather than "misrepresentation," when the loss suffered by the injured party is caused by the breach of a "specific duty" owed by the Government to him, *i.e.*, the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs, is only to state the traditional and commonly understood legal definition of the tort of "negligent misrepresentation" * * *.



Thus, assuming petitioners' allegations to be true, their claim is barred by Section 2680(h).

Contrary to petitioners' contention (Pet. 12), the lower courts have applied *Neustadt* consistently. As the court below noted (Pet. App. 11a), a distinction has been drawn between injury resulting from commercial decisions taken in reliance on governmental misrepresentations,[5] as in *Neustadt*, and personal injury or property damages arising from negligent performance of operational tasks by the government,[6] as in the negligent maintenance of a

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[5]See *Scanwell Laboratories, Inc.* v. *Thomas*, 521 F. 2d 941 (D.C. Cir. 1975), cert. denied, 425 U.S. 910 (1976) (bidder, conforming to government guidelines, submitted bid that lost to bidder who did not conform to guidelines); *Redmond* v. *United States*, 518 F. 2d 811 (7th Cir. 1975) (decision to purchase and pledge worthless securities based on misstatements of fact and half-truths); *Fitch* v. *United States*, 513 F. 2d 1013 (6th Cir. 1975) (misrepresentation of obligation to enter the army that led to loss of income); *Summers* v. *United States*, 510 F. 2d 123 (8th Cir. 1975) (decision to buy a dwelling after a faulty appraisal and inspection); *Moon* v. *Takisaki*, 501 F. 2d 389 (9th Cir. 1974) (decision to purchase house after the government permitted incompetent contractor to perform rehabilitation); *United States* v. *Longo*, 464 F. 2d 913 (8th Cir. 1972) (decision to build a high-rise apartment and medical center complex based on faulty government feasibility study); *Thompson* v. *United States*, 408 F. 2d 1075 (8th Cir. 1969) (decision to purchase apartment house based on faulty economic projection study and faulty or nonexistent inspections); *Smith* v. *United States*, 333 F. 2d 70 (10th Cir. 1964) (decision to purchase farm units based on faulty study of the agricultural productivity of the land).

[6]*Dickens* v. *United States*, 545 F. 2d 886 (5th Cir. 1977) (air traffic controller's failure to warn of wake turbulence); *Yates* v. *United States*, 497 F. 2d 878 (10th Cir. 1974) (air traffic controller's failure to warn of wake turbulence); *Hartz* v. *United States*, 387 F. 2d 870 (5th Cir. 1968) (air traffic controller's failure to warn sufficiently of "wing tip vortex" air turbulence); *Wiseman* v. *United States*, 327 F. 2d 701 (3d Cir. 1964) (failure to warn window washers of dangerous condition of windows). Cf. *De Bardeleben Marine Corp.* v. *United States*, 451 F. 2d 140 (5th Cir. 1971).

lighthouse in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955).

This case clearly falls into the first category. Petitioners assert that they stored their grain with Grain Finance and FGX because CCC approval of the Grain Finance warehouse meant that that warehouse was "a safe place in which to store grain" from an economic, as well as a physical, standpoint (Pet. 6). This decision was a business decision. Because actions based upon business decisions made in reliance on misrepresentations have consistently been held to be excluded from the Tort Claims Act, the court of appeals' decision does not conflict with the rule that has been applied by other courts.

The cases relied on by petitioners fall into the second category and have properly been characterized by the courts as negligence actions. *Ingham* v. *Eastern Air Lines, Inc.*, 373 F. 2d 227 (2d Cir.), cert. denied, 389 U.S. 931 (1967), *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964), and *Wenninger* v. *United States*, 234 F. Supp. 499 (D. Del 1964), aff'd, 352 F. 2d 523 (3d Cir. 1965), all involved airplane crashes caused by the negligence of air traffic controllers. Similarly, *Ramirez* v. *United States*, 567 F. 2d 854 (9th Cir. 1977) (en banc), involved injuries due to medical malpractice, and *Wiseman* v. *United States*, 327 F. 2d 701 (3d Cir. 1964), involved the death of a window washer who was not warned about negligent maintenance of a window frame. None of these cases is inconsistent with the decision below.

Petitioners also contend that the misrepresentation exception applies only where the government has direct business dealings with the party claiming injury, not where the losses are the consequence of dealings between



two private parties (Pet. 14). This contention is erroneous. In *Neustadt*, the claim was also based upon a transaction (the purchase of a house) between private parties.

2. Petitioners contend (Pet. 19-20) that the government owed them a duty to use reasonable care in ascertaining whether the warehouse was a safe place to store grain and to warn them if it was not. This contention is insubstantial.

In order to establish liability under the Federal Tort Claims Act, a plaintiff must show that "the United States, if a private person, would be liable * * * in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). Petitioners claim that the actionable duty in this case derives by analogy from Wisconsin "premises liability" cases that pertain to a landowner's duty to protect invitees from physical injuries (Pet. 19, 20). The district court (Pet. App. 18a) correctly decided this state law question against petitioners, and the court of appeals also noted (Pet. App. 13a n.11) that such cases do not apply to economic injuries. If petitioners could show that a private party who had contracted for the right to audit a warehouseman in exchange for storing grain at the warehouse would have a duty to notify other users of the warehouse of the results of his audits, the United States would have a similar duty here. See *Zabala Clemente* v. *United States*, 567 F. 2d 1140, 1144-1145 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978). However, no such duty exists under Wisconsin law.

This action resembles claims against the government for its conduct of bank examinations. In such circumstances, the courts have held that federal bank regulatory agencies have no duty to inform individuals who could be affected by bank failures of the results of bank examinations. See

*Harmsen* v. *Smith*, 586 F. 2d 156 (9th Cir. 1978). Just as the purpose of federal bank examinations is to safeguard federal interests in the bank, the purpose of CCC and AMS audits and examinations is "to safeguard satisfactorily the interests of CCC." 7 C.F.R. 1421.5557. Accordingly, the government owes no duty to users of CCC-approved warehouses to inform such users of the results of CCC or AMS audits and examinations. Private parties may choose to store their grain in these warehouses based on their knowledge that government inspections and audits will be undertaken, but that is a business decision that they make at their own risk.[7]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]Neither the district court nor the court of appeals ruled on the application of the discretionary function exception of the Tort Claims Act. 28 U.S.C. 2680(a). This exception also bars petitioners' claim in this action. See *Dalehite* v. *United States*, 346 U.S. 15 (1953).

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